Supreme Court, U.S.
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No. 01-716

In The

Supreme Court of the United States

C. ELVIN FELTNER, JR.,

Petitioner,

v.

COLUMBIA PICTURES TELEVISION, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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REVISED QUESTIONS PRESENTED

1. Whether the district court erred in using a motion in limine to confirm its prior determination establishing the number of separate "works" infringed in this copyright case, where the stipulated facts before the court permitted only one answer to the question as a matter of law.

2. Whether a court may hold that a defendant-infringer has waived his right to dispute that a plaintiff has demonstrated copyright ownership (as required by 17 U.S.C. § 501(b)) where that defendant (i) stipulated, before a summary determination of his liability, to facts unequivocally establishing plaintiff's ownership and (ii) first contested plaintiff's ownership in a Rule 60(b) motion made after judgment was entered, based on evidence that was available at the time of the prior stipulation.

STATEMENT PURSUANT TO RULE 29.6

Sony Corporation is the corporate parent of Respondent Columbia Pictures Television, Inc. Other than Sony Corporation, no other publicly held company owns ten percent or more of Columbia Pictures Television, Inc.'s stock.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Columbia Pictures Television, Inc. ("Columbia") respectfully requests that this Court deny the Petition for Writ of Certiorari.

OPINIONS BELOW

In addition to the decisions noted in the Petition, the Ninth Circuit issued an opinion in this case that is reported at 152 F.3d 1171 (1998). It is attached to the Opposition Appendix ("Opp. App.") hereto, at 1a.

STATUTORY PROVISIONS

In addition to the provisions set forth in the Petition, this case involves 17 U.S.C. § 204(a), which provides:

> A transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent.

In relevant part, 17 U.S.C. § 101 defines "transfer of copyright ownership" as:

> an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect, but not including a nonexclusive license.

INTRODUCTION

At the outset, this Court should reject the Petition because Feltner has waived both Questions Presented. Both issues were ripe for review in his 1997 petition to this Court, yet he failed to raise them. This Court will not allow a party to pursue in a second petition issues that

could have been, but were not, raised in his prior petition.

Feltner also is collaterally estopped in this case from raising the first question, based on his unsuccessful litigation of the identical issue in another infringement lawsuit against him. In any event, the question presents no circuit conflict and no important issue of law. The federal circuits have held unanimously that each episode of a television series constitutes a separate "work," infringement of which supports a separate award of statutory damages under 17 U.S.C. § 504(c). Feltner does not dispute this rule of law. Instead, he bases his Petition on the overwrought suggestion that the "integrity of this Court's rulings" (Pet. 9) mandates that it review a routine application of the basic rule that a court may decide as a matter of law issues on which no material factual dispute exists. This Court's 1998 opinion in this case did not require a jury to decide an issue, such as this one, where the stipulated facts permit only one legal outcome.

As to the second question, Feltner never argued below that 17 U.S.C. § 501(b) constitutes a jurisdictional "zone of interest." Nor is that issue really presented here. What Feltner raises is a statute of frauds argument – a challenge to the adequacy of the written agreements assigning Columbia its rights. Both Columbia and its grantors (which are its corporate affiliates) agree the rights conveyed are exclusive, and a third-party infringer such as Feltner is barred by law from asserting otherwise. In any event, Feltner's proposed interpretation of these writings is untenable.

Moreover, Section 501(b) is not jurisdictional. It is universally recognized that statutory ownership is an element of copyright infringement. No court has adopted Feltner's extreme view that Section 501(b) establishes a non-waivable standing requirement. Feltner's novel argument is contradicted by the very prudential standing

cases on which he relies, and by Section 501's legislative history. Finally, while parties cannot stipulate to jurisdiction, it is well established that they can stipulate to facts bearing on jurisdiction. Here, even if Section 501(b) were jurisdictional, Feltner would be bound by his prior stipulation that Columbia owned the rights at issue.

STATEMENT OF THE CASE

Petitioner Feltner is the sole owner of Krypton International Corporation, which in 1990 acquired three television stations in the southeastern United States. App. 28a. Prior to their purchase by Feltner's companies, two of the stations had license agreements with Respondent Columbia, in which Columbia granted the stations the exclusive right to broadcast, in their respective markets, all episodes of the television series "Who's the Boss?" and "Silver Spoons." Feltner's companies assumed these exclusive licenses. The third station, shortly after Feltner purchased it, negotiated original exclusive license agreements directly with Columbia to broadcast episodes of "Hart to Hart" and "T.J. Hooker." *Id.*; App. 3a. Hundreds of episodes of the four series were licensed to the stations on an exclusive basis. All of the agreements required the stations to pay monthly license fees.

The stations failed to make timely licensing payments. Feltner and Columbia entered negotiations to restructure the stations' multi-million-dollar debt, to no avail. App. 29a. As a result, in October 1991 Columbia terminated all of the stations' licenses. *Id.* Nevertheless, the stations continued to broadcast the programs. *Id.* On December 17, 1991, Columbia instituted this action, alleging copyright infringement against Feltner.[1]

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[1] Other claims and other defendants were dismissed prior to the first trial.

The stations continued to broadcast the programs until June 30, 1993, over 18 months after the lawsuit was initiated. During this period, hundreds of episodes of Columbia's programs were shown – some on as many as four separate occasions. (The occurrence of every broadcast was detailed in the "Second Amended Pre-Trial Conference Order" to which the parties later stipulated.)

In December 1992, after the close of discovery, Columbia moved for partial summary judgment to establish Feltner's liability for contributory and vicarious copyright infringement. Columbia recognized that to establish its infringement claim it had to demonstrate that it owned the rights at issue (*i.e.*, that it either owned the work exclusively or held an exclusive license in the right allegedly infringed). 17 U.S.C. § 501(b). To establish this element, Columbia submitted with its motion the declaration of Columbia Senior Vice President Gregory K. Boone. Opp. App. 4a. That declaration showed that each episode of all four series was authored, owned and registered by either Columbia, or by ELP Communications ("ELP") or CPT Holdings ("CPT"), both corporate affiliates of Columbia. ELP and CPT, in turn, granted Columbia the exclusive right to license television stations the right to broadcast episodes of the four series at issue. Opp. App. 5a-6a, 9a, 11a. The transfers of rights from ELP and CPT to Columbia were embodied in two 1988 assignments, which were produced to Feltner during discovery. The assignments were attached to the Boone declaration and thus were available to Feltner, and the district court, with Columbia's summary judgment motion.[2]

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[2] The lengthy 1988 assignments are part of the record below. The relevant grants of rights are quoted *verbatim* in the portion of the Boone Declaration attached at Opp. App. 9a (¶ 14) and 11a (¶ 21).

Feltner did not dispute the validity of the exclusive assignments made to Columbia by its affiliates. Nor did he dispute that his stations had for years enjoyed the exclusive rights, conveyed by Columbia, to broadcast the four series in their respective markets. Rather, he stipulated that Columbia owned the exclusive right to license the works to television stations throughout the United States Pet. 5; App. 52a, 79a.

On September 28, 1993, the district court granted partial summary judgment in Columbia's favor, finding Feltner contributorily and vicariously liable for the three stations' infringing broadcasts. App. 72a. The court concluded as a matter of law that "[e]ach of the 664 broadcasts of an episode made after the program license was terminated constituted an infringement of a copyrighted work" and that Columbia was entitled to an order that Feltner was liable for 664 infringements of Columbia's copyrighted works.[3] App. 79a-80a.

In February 1994, Feltner sought to vacate the summary judgment order, based entirely on a fanciful new interpretation of documents that had been produced to him in discovery prior to Columbia's summary judgment motion. Feltner contended for the first time that the 1988 assignments from ELP and CPT did not grant Columbia exclusive rights. He claimed that Columbia did not obtain exclusive rights until February 1992, when ELP and CPT filed short-form memoranda with the Copyright Office acknowledging the 1988 assignments and describing them as exclusive.[4] Pet. 5. This argument disregarded

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[3] The parties later stipulated in the pre-trial order that the stations had in fact broadcast a total of 440 episodes. App. 69a.

[4] Contrary to Feltner's claim (Pet. 5 n.2, 20) the memoranda are not licenses, but simply filed acknowledgements of the prior agreements. The Copyright Office procedures specifically provide for such filings. *See* 37 C.F.R. § 201.4.

Feltner's own prior dealings with Columbia, which were based entirely on Columbia's having the exclusive authority to sublicense to television stations the exclusive right to broadcast the programs in each geographic market; his summary judgment stipulation that Columbia owned the rights in question; and the fact that Columbia and its grantors were affiliated companies that both interpreted the written assignments as exclusive.

The district court refused to grant Feltner leave to file the out-of-time motion, finding he failed to meet the requirements of a motion for reconsideration or a motion to vacate under Fed. R. Civ. P. 60(b) – in other words, that he raised no new issue of fact or law, or other circumstance, justifying reopening the issue. Pet. 5, App. 52a. In reaching this conclusion, the district court implicitly rejected the claim – which Feltner renews here – that he had belatedly "uncovered evidence" to refute Columbia's exclusive license. Pet. 19-20. Indeed, the "new" evidence presented in the motion to vacate was simply the 1988 assignments and the memoranda of those assignments later filed with the Copyright Office, all of which had been produced to Feltner in discovery before Columbia moved for summary judgment.

Columbia subsequently elected to recover statutory damages under 17 U.S.C. § 504(c). A bench trial was held to determine the amount. At the outset, before hearing any trial testimony, the district court confirmed its written summary judgment finding that "each broadcast[ ] of an episode" was an infringement of a copyrighted work. App. 83a. Specifically, the court ruled that each episode of a television series is a separate work and that two stations that had broadcast some of the same episodes of "Who's the Boss?" were separate infringers. Based on these rulings of law and on the stipulated facts, the stations had infringed 440 works, each supporting a separate award of statutory damages. App. 83a. During the

bench trial, Feltner proffered evidence he contended was relevant to the determination of the number of works infringed. App. 64a, 87a. The court rejected this offer of proof, stating that the issue already had been resolved as a matter of law. App. 84a-87a; *see also* App. 69a; App. 21a (later district court order confirming this holding was "made by the court as a matter of law").

Following the bench trial, the district court ruled that Feltner's infringement was willful, and awarded Columbia statutory damages of $20,000 per work infringed, or $8.8 million. App. 69a-70a. Feltner filed a voluminous appeal, challenging (among many other things) the district court's rulings on the same two issues he raises in the instant Petition. App. 48a, 52a, 62a. Feltner also argued that he was wrongfully denied a jury trial on the amount of statutory damages. App. 57a. The court of appeals rejected all of these grounds and affirmed the statutory damages judgment.

On March 12, 1997, Feltner petitioned this Court for *certiorari* on six distinct issues, including the same two he raises in the instant petition. The next day he withdrew that petition, and subsequently filed another petition seeking review solely on whether he was entitled, under 17 U.S.C. § 504(c) or the Seventh Amendment, to have a jury set the amount of statutory damages. This Court accepted review and reversed. App. 42a.

Prior to remand to the district court, Feltner petitioned the court of appeals for attorneys' fees, claiming that he was a "prevailing party" entitled to fees under 17 U.S.C. § 505. The court denied the motion in a published opinion, holding:

> Although the Supreme Court ruled in [Feltner's] favor on the narrow issue of whether he was entitled to a jury trial on statutory damages, the Court left undisturbed the district court's finding, affirmed by this court, that Feltner is liable

> to Columbia for 440 separate instances of copyright infringement. Because the Supreme Court's opinion does not alter Feltner's liability for copyright infringement and Columbia's entitlement to statutory damages in an amount to be determined by a jury, Feltner is not the prevailing party in this case.

Opp. App. 2a. Feltner did not seek review of the conclusion that he remained liable for infringing 440 of Columbia's copyrighted works.

On remand to the district court, Columbia moved to confirm the ruling – affirmed twice by the court of appeals and not reviewed by this Court – that Feltner was liable, as a matter of law, for infringing 440 copyrighted works. The district court granted the motion, noting that its prior ruling was based on undisputed facts, and on legal conclusions not affected by subsequent developments in the case. App. 21a ("The prior ruling was made by the court as a matter of law, since there were not factual issues.").

Also prior to the jury trial, Feltner moved in limine to preclude a damages award, alleging that Columbia still lacked standing because it did not own exclusive rights in the works. The district court again rejected Feltner's motion because, as an effort to refute Columbia's case on liability, "[i]t should have been brought in opposition to the Plaintiff's motion for summary judgment as to liability." App. 26a. The district court also rejected Feltner's attempt (which he repeats here) "to frame this issue as one of constitutional standing, which can be raised at any time." The court recognized that the issue raised by Feltner is not "standing" – "[t]here is not a dispute about whether the Plaintiff suffered injury in fact" – but only whether Columbia satisfied one "element of copyright infringement." *Id.* 26a n.1.

A jury trial was held April 6-8, 1999. The jury returned a verdict of $31.7 million, and judgment subsequently was entered in that amount.

Feltner again appealed on numerous grounds, nearly all of which had been resolved in the prior appeal. The court of appeals affirmed on all issues. The court noted that while the calculation of the number of works infringed for statutory damages purposes can be a jury question, in this case "there are no underlying factual disputes for the jury to resolve." App. 10a. The court of appeals also concluded that Feltner's assertion that Columbia lacked "standing" to sue was previously decided and that its prior ruling was law of the case. App. 7a.

REASONS WHY THE PETITION SHOULD BE DENIED

I. FELTNER IS PRECLUDED FROM RAISING THE QUESTIONS PRESENTED BECAUSE HE COULD HAVE RAISED BOTH ISSUES IN HIS LAST PETITION TO THIS COURT, AND CHOSE NOT TO DO SO.

As a threshold matter, Feltner waived his right to press both Questions Presented when he failed to raise either issue in his last appearance before this Court. This Court has held that a party which could have, but did not, raise an issue in a first petition for *certiorari* is not entitled to raise the same issue in a second petition. *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 30-32 (1961). Both issues presented in Feltner's current Petition were ripe for resolution by this Court in 1998. In fact, Feltner ***did*** raise both issues in a 1997 petition that he subsequently withdrew. He later sought review only on his entitlement to a jury trial on statutory damages. By doing so, he abandoned any challenge he may have had on both questions in the current Petition.

Though Feltner attempts to avoid this bar by characterizing his second Question Presented as a standing issue that can be raised at any time, this preclusion principle applies with full force even to such supposedly "jurisdictional" arguments. Having raised the issue of Columbia's ownership, and having lost on appeal, and having failed to seek this Court's review in 1997, Feltner is not entitled to raise it again hoping to achieve a different result. *Communist Party*, 367 U.S. at 30-32. This Court has recognized that even standing issues "should be subject to the general principles of finality and repose, absent changed circumstances or unforeseen issues not previously litigated." *Wyoming v. Oklahoma*, 502 U.S. 437, 446 (1992) (*quoting Arizona v. California*, 460 U.S. 605, 618-19 (1983)); *Free v. Abbott Laboratories, Inc.*, 164 F.3d 270, 272-73 (7th Cir. 1999); *Ferreira v. Borja*, 93 F.3d 671, 674 (9th Cir. 1996) (applying law of the case to prior determination of subject matter jurisdiction; "[i]t makes sense that, at some point, even jurisdictional rulings achieve a reasonable level of finality.").

In effect, Feltner claims the right to pursue sequential, piecemeal appeals in this Court. Such gamesmanship cannot be countenanced. Had Feltner raised his current Questions Presented in his prior petition, any alleged error by the courts below could have been addressed in this Court's prior opinion, and any alleged post-remand error would have been avoided.

II. THE LOWER COURTS' DECISION NOT TO REQUIRE ADDITIONAL PROCEEDINGS TO DETERMINE THE NUMBER OF "WORKS" AT ISSUE DOES NOT WARRANT REVIEW BY THIS COURT.

Even if Feltner were not precluded from bringing this Petition, neither issue he raises is worthy of review. This

Court should decline to review the first Question Presented, first, because Feltner is collaterally estopped from contending that each television episode does not constitute a separate work under 17 U.S.C. § 504(c). Second, he fails to raise any important or disputed issue of federal law. Every federal circuit to consider the question has held that under the facts that were stipulated to in this case, an episode of a television series is an individual "work," infringement of which supports a separate award of statutory damages. Feltner does not dispute this. He only quibbles over the court of appeals' routine application of elementary rules of civil procedure. Because there was no material factual dispute regarding the number of works infringed in this case, the issue was properly decided as a matter of law.

A. Feltner Is Collaterally Estopped from Raising this Issue.

Feltner is collaterally estopped from refuting that each episode of a television series is a separate work. Feltner litigated the identical issue – on the merits, unsuccessfully and to finality – before the Eleventh Circuit. *MCA Television Ltd. v. Feltner*, 89 F.3d 766, 768-70 (11th Cir. 1996), *cert. denied*, 520 U.S. 1117 (1997). The facts were materially identical to those here. The court held that each episode of a television series was a separate work, and affirmed a copyright statutory damage judgment of $9 million against Feltner based on hundreds of infringing broadcasts by his television stations. The judgment was final, and thus binding, by 1997. Therefore, Feltner was precluded from raising the issue in this case prior to the 1999 jury trial, and he is barred from pursuing it here. *United States v. Stauffer Chemical Co.*, 464 U.S. 165, 170-71 (1984); *Disimone v. Browner*, 121 F.3d 1262, 1267 (9th Cir. 1997).

B. Even if Feltner Could Raise the Issue, the Court of Appeals' Ruling Represents Nothing More than a Routine Application of Basic Principles of Summary Adjudication.

1. The Issue of Whether the District Court Erred in Granting the Motion in Limine Does Not Present an Important or Disputed Issue of Federal Law.

Even if Feltner could challenge the court of appeals' refusal to require that a jury determine the number of "works" he infringed, that issue would not merit review by this Court. Feltner acknowledges (as did the courts below) that nothing in this Court's prior opinion in this case altered the ordinary rules of civil procedure – including the rules providing that where there is no genuine dispute on any material fact, a matter can be decided by the court as a matter of law. Pet. 12; App. 10a-11a (*citing Segrets Inc. v. Gillman Knitwear Co.*, 207 F.3d 56, 65 n.7 (1st Cir.), *cert. denied*, 531 U.S. 827 (2000)).

Feltner's "issue," therefore, amounts to nothing more than an argument about the procedure used by the courts below to decide a legal question on stipulated facts. Needless to say, this is not an important or disputed issue of federal law: the rules governing pre-trial motions and summary disposition of legal issues are well settled and consistently applied throughout the circuits. Feltner does not argue otherwise. Nor is there any conflict here: Feltner points to no case holding that *every* issue concerning copyright damages – or any other type of action – must be presented to the jury, no matter how clearly meritless one party's position is on the facts.

2. This Court's Prior Decision Did Not Require Additional Proceedings to Determine the Number of Works Infringed.

Recognizing that he presents no serious or disputed federal issue here, Feltner is reduced to asserting that "the integrity of this Court's rulings" (Pet. 9) demands review of the court of appeals' application of the rules of civil procedure to the issue of how many "works" are involved in this case. This is mere puffery. This Court's opinion in this case did not discuss, much less resolve, the issue of how many works Feltner had infringed. The question presented in *Feltner* was whether Section 504(c) or the Seventh Amendment grants a right to a jury trial when a copyright owner elects to recover statutory damages. App. 28a. This Court held that the Seventh Amendment required a right to have a jury, rather than a judge, determine the amount, within the statutory range, of the damages to be assessed. This Court based its holding on evidence that copyright cases historically were tried to juries, and on the monetary nature of the statutory damages remedy. App. 34a-41a.

Although this Court recited the fact that Feltner had been found liable for "440 acts of infringement," it did not review Feltner's liability, or address whether each episode was a separate work, or discuss (much less reverse) the legal bases for the calculation made by the courts below.[5] App. 30a. *See* 4 M. Nimmer & D. Nimmer,

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[5] Feltner's assertion that Columbia "asked this Court to reaffirm . . . that each episode of each series was a separate work" (Pet. 6 n.3) is misleading. Columbia asked this Court only to affirm the decision below. Columbia did address the calculation of works infringed, to correct Feltner's mischaracterization of the proceedings below and to demonstrate that the issue could not be an *independent* ground for reversal. As Feltner notes, this Court simply did not discuss the issue. *Id.*

NIMMER ON COPYRIGHT ("Nimmer") § 14.04[E][1] at 14-70.1 (2001) (this Court in *Feltner* "makes mention of that methodology of multiplying statutory damages [but] nothing in its reversal casts doubt on this aspect of the circuits' manner of proceeding."). The court of appeals thus properly concluded that this Court "left undisturbed" Feltner's liability "for 440 separate instances of copyright infringement." Opp. App. 2a.

3. The Court of Appeals Did Not Misapply Any Rule Governing Summary Adjudication, But Simply Applied a Unanimous Rule of Law to Undisputed Facts.

Finally, the courts below did not err in summarily resolving the issue of how many separate works were involved in this case. Under the unanimous rule of every federal circuit to consider the issue – a rule that Feltner does not even challenge here – there are no additional facts that he could present that would have altered the legal conclusion that each television episode here constituted a separate work. The court of appeals was thus entirely correct to hold that no further proceedings were required.

The Copyright Act entitles a plaintiff to recover a separate award of statutory damages "for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually. . . . " 17 U.S.C. § 504(c). The four federal circuits to consider the question all have held definitively that each episode of a television series is a separate "work," infringement of which supports one award of statutory damages, where the episodes are written or produced separately, or can be displayed or viewed individually. App. 10a, 62a; *MCA Television*, 89 F.3d at 768-70; *Gamma Audio & Video Inc. v. Ean-Chea*, 11 F.3d 1106, 1116-17 (1st

Cir. 1993); *Twin Peaks Prods., Inc. v. Publications Int'l, Ltd.*, 996 F.2d 1366, 1381 (2d Cir. 1993).

Feltner does not dispute the legal standard applied in these cases. He argues only that because determination of the number of works infringed is a "mixed question of law and fact,"[6] the courts below had to entertain further evidence on the question. Pet. 11-12. He is incorrect. The court of appeals did nothing more than apply an established legal rule (one Feltner concedes is correct) to stipulated facts, and conclude that there was only one possible answer to the question of how many works Feltner infringed.

This conclusion was correct. The other circuit decisions addressing this issue confirm that on the facts presented here, each episode was a separate work as a matter of law. In *Twin Peaks*, the Second Circuit held that each episode of a television series was a separate work where each was "separately written." 996 F.2d at 1381. From this fact alone the court concluded that "ours is the easy case of infringement of eight separate works that warrants eight statutory awards. . . . " *Id.* The court found the case "easy" even for a series "in which one or more plots continue from one episode to another."[7] 996 F.2d at

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[6] *Gamma Audio*, 11 F.3d at 1116. The Ninth Circuit agreed, finding that the issue of what constitutes a "work" for statutory damages purposes can, in appropriate cases, be a jury question. App. 10a; *see Leicester v. Warner Bros.*, 232 F.3d 1212 (9th Cir. 2000) (citing same as holding it "is a question of fact . . . whether episodes of a television series should be considered 'separate works' or parts of 'one work.' ").

[7] Because of its continuing plot, "Twin Peaks" is perhaps more accurately labeled a "serial," rather than a series. Feltner's application of the "serial" label to the four series at issue here (*e.g.*, Pet. 12) is inappropriate and misleading. Each episode of those four series is a separate story without a plot continuing into other episodes.

1381. This case is even easier: none of the four series at issue relies on ongoing plots in the manner of "Twin Peaks," which "carried the style to its limit. . . . " *Id.*

Following *Twin Peaks*, both the First and Eleventh Circuits had no difficulty also concluding that each episode of a television program is a separate work. In *Gamma Audio*, the First Circuit held that whether an episode is a separate work depends on whether each episode "has an independent economic value and is, in itself, viable." 11 F.3d at 1117 (*quoting Walt Disney Co. v. Powell*, 897 F.2d 565, 569 (D.C. Cir. 1990)).[8] The court found each episode economically viable based on the facts that each episode was separately produced, and could be viewed individually. *Gamma Audio*, 11 F.3d at 1117. The Eleventh Circuit, as discussed above, reached the same conclusion on facts materially identical to the instant case. *MCA Television*, 89 F.3d at 768-70.

In the face of this precedent, there is no question that the courts below correctly found that there was no need to allow further evidence to be presented with regard to the calculation of the number of works infringed. In Feltner's first appeal in this case, the court of appeals noted that the episodes have ***all*** of the indicia of independent value relied on by the First, Second and Eleventh Circuits: (1) they were broadcast multiple times over many months, and could be "repeated and rearranged at the option of the broadcaster"; (2) viewers could watch the episodes individually, viewing as few or as many as they wanted; and (3) the episodes were separately written, produced, and registered. App. 63a-64a. Feltner stipulated to these facts prior to the bench trial, and ratified this stipulation before the second trial. *See* Stipulation

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[8] Feltner cites *Powell* in a manner that suggests the case involved television programming. Pet. 11. It does not: the work at issue was a pictorial cartoon figure.

Adopting and Modifying Bench Trial Pre-Trial Order for Use at Jury Trial. Because the undisputed facts were unchanged, the court of appeals was correct to reach the same legal conclusion in Feltner's second appeal – namely, that 440 works were infringed. App. 11a.

Feltner contends that he should have been permitted to demonstrate a material factual dispute regarding whether each episode was an individual "work." Notably, his Petition fails to state what facts might form the basis for him to allege such a dispute. At the bench trial in 1994, Feltner sought to offer evidence that Columbia licensed the works as a series, not as separate episodes. But this fact is not disputed: the courts below considered it but found the manner in which a licensor distributes a television series to be irrelevant to whether the episodes are individually viable. 11a, 21a, 63a, 85a. The First Circuit reached the identical conclusion, holding that the manner plaintiff licensed the works "in no way indicates that each episode in the series is unable to stand alone." *Gamma Audio*, 11 F.3d at 1117. The Eleventh Circuit concurred when Feltner raised the same argument in *MCA Television*. 89 F.3d at 769. There is no contrary authority.

The only other "evidence" Feltner sought to introduce below was that each of the Columbia series was an "anthology," and thus a "collective work" entitled to a single award of statutory damages. He sought to submit evidence that a clause in one license refers to "anthologies" (although in a manner unrelated to the Copyright Act definition of "anthology"). The district court at the first trial rejected Feltner's proffer, finding the evidence irrelevant. App. 87a. The court of appeals considered this evidence and found that the series did not meet the legal definition of an "anthology" under the Copyright Act. App. 63a-64a. This holding was in accordance with the Eleventh Circuit's treatment of the identical issue. *MCA Television*, 89 F.3d at 769.

Because Feltner's proffered evidence was not relevant to the calculation of the number of works infringed (or any other issue to be tried), it could not form the basis for any "material" dispute, and could not be presented to the jury. The courts below were correct to hold that no further proceedings were required to confirm their prior holdings.

III. THE COURT OF APPEALS' TREATMENT OF FELTNER'S "STANDING" ARGUMENT DOES NOT WARRANT REVIEW BY THIS COURT.

The second Question Presented – whether Feltner is entitled to challenge Columbia's ownership of the works at issue after stipulating to it on summary judgment – also does not merit review. First, by issuing an opinion on the merits in this case in 1998, this Court already has implicitly determined that subject-matter jurisdiction exists. Second, the Petition should be denied because it is based on nothing more than Feltner's argument that the 1988 written assignments to Columbia did not grant exclusive rights. But Feltner by law is not entitled to escape infringement liability by disputing the meaning of a copyright assignment where the parties to the assignment have no dispute. Third, no court has held that Section 501(b)'s ownership requirement is jurisdictional. The statute universally is treated, and was intended by Congress, as simply an element of a copyright plaintiff's claim of infringement. Feltner's misguided attempt to convert a merits issue – one on which Columbia rightfully prevailed eight years ago – into a jurisdictional one has no basis in law. Fourth, no court has adopted or even considered Feltner's radical position that, where a plaintiff satisfies the Article III and judicial tests for standing (as Columbia does), alleged failure to satisfy Section 501(b) triggers subject-matter-jurisdiction concerns that can be raised at any time. Fifth, even if the statute were

jurisdictional, Feltner is bound by his prior stipulation to the fact that Columbia owned the rights at issue. Finally, any challenge to the exclusivity of the rights granted by the 1988 assignments would fail on the merits.

A. This Court Already Has Implicitly Rejected Feltner's Argument.

Even if Feltner were correct (and he is not) that a challenge to a copyright plaintiff's compliance with 17 U.S.C. § 501(b) can be raised at any point in a proceeding, Feltner ***did*** raise the issue of Columbia's ownership prior to his first appeal. Indeed, this Court already has implicitly rejected Feltner's argument that this issue is directed to jurisdictional "standing": as Feltner acknowledges, this Court has an obligation to address true standing issues *sua sponte*, even if the parties do not raise them. Pet. 13. The question of whether Columbia's license satisfied 17 U.S.C. § 501(b) was fully apparent from the first court of appeals opinion. App. 52a. That this Court proceeded to address the merits of Feltner's Seventh Amendment appeal demonstrates that this Court accepted the ruling below that Columbia met all jurisdictional standing requirements.

B. This Case Does Not Present the Issue Feltner Raises, Because He Cannot Contest the Writings Under Which Columbia Obtained Exclusive Rights.

The second question is unworthy of review because Feltner is not entitled to challenge the meaning of the agreements granting Columbia its rights in the works at issue. Feltner's argument that Columbia lacks standing rests entirely on this belated challenge, in which he purports to dispute the interpretation of the 1988 assignments from ELP and CPT to Columbia. Feltner is not a party to those assignments, and the parties themselves –

Columbia and its two corporate affiliates – agree that the assignments do convey exclusive rights. Opp. App. 5a, 9a, 11a. In other words, Feltner was urging the courts below to enforce an interpretation of the 1988 assignments that the signatories did not intend and have never adopted.

By law, he is not entitled to do so. It is well established that where "the copyright holder appears to have no dispute with its licensee on th[e] matter, it would be anomalous to permit a third party infringer" to dispute the validity of the transfer. *Eden Toys, Inc. v. Florelee Undergarment Co.*, 697 F.2d 27, 36 (2d Cir. 1982); *Magnuson v. Video Yesteryear*, 85 F.3d 1424, 1428-29 (9th Cir. 1996); *Imperial Residential Design, Inc. v. Palms Development Group*, 70 F.3d 96, 99 (11th Cir. 1995). The application of this rule is "particularly compelling" where, as here, the licensor and licensee are related parties. *Magnuson*, 85 F.3d at 1429.[9] These cases prohibit exactly what Feltner proposes here.

Feltner, in sum, comes to this Court with nothing but a statute of frauds issue. He acknowledges there were written assignments to Columbia of the works at issue, as required by the Copyright Act. 17 U.S.C. § 204(a). He simply challenges the adequacy of those writings. Pet. 20.

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[9] A defect in a written transfer of exclusive rights can be corrected retroactively, even after litigation has commenced against a third-party infringer. *Eden Toys*, 697 F.2d at 36 (writing requirement "is satisfied by the copyright owner's later execution of a writing which confirms the [informal] agreement."); *accord, Imperial Residential*, 70 F.3d at 99. Here, it is undisputed that Columbia and its grantors intended the 1988 assignments to convey exclusive rights. Even if the writings failed to reflect this intent, any defect could be corrected through a writing validating the parties' 1988 understanding *ab initio*.

Even if Feltner were entitled to raise this issue, construction of the 1988 assignments – or even, more generally, of Section 204(a) – does not raise any circuit conflict or any issue so weighty as to require review by this Court.

C. No Court Has Ever Accepted the Subject-Matter Jurisdiction Argument Feltner Makes Here.

No court has ever suggested that Section 501(b)'s ownership requirement is a prerequisite to a federal court's subject matter jurisdiction that may be raised at any time. Subject matter jurisdiction over copyright cases is governed by 28 U.S.C. § 1338(a), which entitles federal courts to hear "any civil action arising under any Act of Congress relating to . . . copyrights. . . . " Here, the question of whether this case "arises under" the Copyright Act has been litigated to finality in Columbia's favor. App. 48a-49a.[10] Feltner can point to no authority even suggesting that 17 U.S.C. § 501(b) is intended to narrow the scope of the jurisdiction conferred by 28 U.S.C. § 1338(a). Certainly, no court has ever characterized Section 501(b) as defining a jurisdictional "zone of interest."

On the contrary, federal courts unanimously recognize that ownership is simply an element of a copyright infringement claim – not a jurisdictional prerequisite. "To establish infringement, two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original." *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361

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[10] Feltner suggests that Section 1338(a) has not been satisfied (Pet. 13-14), but fails to mention that he lost this argument in his first appeal to the Ninth Circuit and did not seek further review. App. 48a-49a.

(1991).[11] Feltner's claim that the first element is jurisdictional, and thus not waivable, simply cannot be reconciled with how copyright cases actually are adjudicated. For example, where a defendant concedes or stipulates to the ownership element, courts routinely treat the issue as resolved, and proceed to decide only issues related to copying. *Id.* ("The first element is not at issue here; Feist appears to concede that Rural's directory, considered as a whole, is subject to valid copyright. . . . The question is whether Rural has proved the second element."); *Leigh v. Warner Bros., Inc.*, 212 F.3d 1210, 1214 (11th Cir. 2000) (ownership of valid copyright assumed for purposes of summary judgment and appeal); *Atari, Inc. v. North American Philips Consumer Electronics Corp.*, 672 F.2d 607, 614 (7th Cir. 1982) (no need to consider ownership issues where "[t]he parties stipulated to the validity of plaintiff's copyright. . . . "). These and legions of other reported copyright cases would make no sense if Section 501(b) were jurisdictional.

Conversely, where a plaintiff is unable to prove copying, a court will dismiss the copyright claim on the merits and with prejudice. *E.g., Benson v. Coca-Cola Co.*, 795 F.2d 973, 974 n.1 (11th Cir. 1986) ("Given the dearth of the evidence on proof of copying, we find it unnecessary to reach the issue of ownership."). Were Feltner correct that failure to satisfy Section 501(b) deprives a court of jurisdiction, courts would need to determine, *sua sponte* before dismissal with prejudice could be permitted, whether

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[11] Innumerable cases adopt this formulation and recognize ownership as an element of a cause of action for infringement. *E.g., Yurman Design, Inc. v. PAJ, Inc.*, 262 F.3d 101, 109 (2d Cir. 2001); *Segrets*, 207 F.3d at 60 (1st Cir. 2000); *Ellis v. Diffie*, 177 F.3d 503, 506 (6th Cir. 1999); *Stenograph LLC v. Bossard Assocs. Inc.*, 144 F.3d 96, 99 (D.C. Cir. 1998); *Harris Custom Builders, Inc. v. Hoffmeyer*, 92 F.3d 517, 519 (7th Cir. 1996).

plaintiff has proven ownership – even where the defendant has conceded ownership. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89 (1998) (court cannot reach merits of claim before deciding whether it has subject-matter jurisdiction). That no court has done so demonstrates the universal recognition that the inability of a copyright plaintiff to satisfy Section 501(b) amounts only to a failure to state a claim.

Feltner does not cite a single case in which any court has characterized Section 501(b) as a jurisdictional "zone of interest," or has allowed a defendant to raise a supposed "statutory standing" issue after it has been conclusively litigated in plaintiff's favor. Nor does he cite any case that has analyzed this bizarre contention. He relies on *dicta* in two patent cases, but neither discusses "zones of interest," and neither holds that a defendant in an infringement action has a non-waivable, jurisdictional right to raise an untimely challenge to plaintiff's ownership. Pet. 18-19. *Rite-Hite Corp. v. Kelly Co.*, 56 F.3d 1538 (Fed. Cir. 1995), held only that "simpl[e] sales contracts" did not grant plaintiffs proprietary rights as required by the Patent Act. *Id.* at 1553. The court explicitly held that defendant preserved the ownership issue for appeal – a finding that would have been unnecessary were the court treating the issue as one of jurisdictional standing. *Id.* at 1554 n.12. *Gaia Technologies v. Reconversion Technologies*, 93 F.3d 774 (Fed. Cir. 1996) held that minutes of a board of directors meeting were insufficient to satisfy the requirement that patent assignments be in writing – a challenge defendants preserved prior to judgment and properly renewed on appeal. *Id.* at 776, 777. In contrast, Feltner did not seek to vacate the finding that plaintiff met statutory ownership requirements until after the issue had been decided and a judgment of infringement liability had been entered. On analogous facts, a patent defendant's "contention that plaintiff has no cognizable rights under

U.S. patent law does not go to the Court's subject matter jurisdiction over plaintiff's claims but rather to the merits of those claims." *Yarway Corp. v. Eur-Control USA, Inc.*, 225 U.S.P.Q. 45, 46 (N.D. Ga. 1984) (denying motion to vacate after trial), *aff'd in part and rev'd in part on other grounds*, 775 F.2d 268 (Fed. Cir. 1985).

Moreover, these Patent Act cases obviously say nothing about what Congress intended when it adopted the Copyright Act. That statute's legislative history confirms that Section 501(b) does not define a jurisdictional "zone of interest" and does not limit the authority of the federal courts. Rather, its express purpose is "to safeguard the rights of all copyright owners and to avoid a multiplicity of suits," by enabling "the owner of a particular right to bring an infringement action in that owner's name alone. . . . " H.R. Rep. No. 94-1476, 94th Cong., 2d Sess., at 158-59, reprinted in 1976 U.S.C.C.A.N. News 5774-75; *see also* 3 Nimmer § 12.02[B] (discussing statutory "standing" as issue of divisibility of copyright ownership, not jurisdiction). The purpose of Section 501(b) – preventing overlapping lawsuits by multiple copyright owners – is wholly served by requiring a plaintiff to show, at the time liability is established, that he exclusively owned the right allegedly infringed. No court has read more into the statute than that.

D. The Universal Rule that Ownership Is an Element of an Infringement Claim – and thus at Some Point Is Waivable – Is Correct.

For the first time in this 10-year-old case, Feltner raises the radical and unprecedented argument that under this Court's prudential standing cases, Section 501(b) defines a non-waivable "zone of interest" beyond which federal courts lack any adjudicative authority. This argument is based on a misreading of *Bennett v. Spear*, 520 U.S. 154 (1997) and an attempt to extend this Court's

"prudential standing" doctrine beyond all recognized bounds. This Court has never equated statutory prerequisites for bringing an action with "zone of interest" standing limitations, as Feltner urges.

Feltner does not raise a true jurisdictional challenge. Columbia's standing under Article III clearly is not at issue: Feltner has never disputed that he caused Columbia a constitutionally sufficient "injury in fact" that is redressable here. App. 26a n.1; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Feltner instead relies on one of the "judicially self-imposed limits on the exercise of federal jurisdiction" collectively known as "prudential standing." *Bennett*, 520 U.S. at 162 (*quoting Allen v. Wright*, 468 U.S. 737, 751 (1984)). Specifically, he relies on the principle "that a plaintiff's grievance must arguably fall within the zone of interests protected or regulated by the statutory . . . provision invoked in the suit." *Bennett*, 520 U.S. at 162. Where the zone of interest test applies, it only "denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit. The test is not meant to be especially demanding." *Clarke v. Securities Industry Assn.*, 479 U.S. 388, 399 (1987).

But Feltner does not even contend that Columbia fails *this* test. He argues instead that Section 501(b) defines a heightened jurisdictional "zone of interest" that must be met to achieve standing in copyright cases. This proposition is incorrect, for several reasons.

First, the zone-of-interest standing test does not apply to this case. "The 'zone of interest' test is a guide for deciding whether, in view of Congress' evident intent to make agency action presumptively reviewable, a particular plaintiff should be heard to complain of a

particular agency decision."[12] *Clarke*, 479 U.S. at 399 (emphasis added). This Court also has applied the test to challenges brought to state regulatory and taxation schemes. *E.g.*, *Dennis v. Higgins*, 498 U.S. 439 (1991). The Petition cites no authority in which a prudential zone of interest test was applied to statutorily authorized civil actions between private plaintiffs.

Second, none of this Court's prudential standing cases even suggests the bold theory espoused by Feltner – that any statutory prerequisite to bringing suit automatically amounts to a jurisdictional zone of interest. Feltner's reliance on *Bennett* is entirely misplaced: that case (and the statutes it cites)[13] all involve situations in which Congress superceded the prudential zone-of-interest limitation – that is, granted rights of action to persons who otherwise would have been barred from suing by prudential standing rules. *Bennett*, 520 U.S. at 163-65. *Bennett* does not equate "statutory standing" with prudential zone of interest limitations; it holds only that where Congress authorizes suit in a manner that is *more permissive* than the default zone-of-interest test, it "negates the zone-of-interests test (or, perhaps more accurately, expands the zone of interests)," *id.* at 164, and the statute is to be applied "at face value" regardless of prudential restrictions. *Bennett*, 520 U.S. at 165-66.[14] *Bennett*, and the

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[12] "This requirement applies when a person is challenging an administrative regulation that does not directly control the person's actions." Erwin Chemerinsky, FEDERAL JURISDICTION (3d ed. 1999) § 2.3.6 at 98.

[13] The Petition (at 16) sets forth the statutes discussed in *Bennett*, and ends the list with a reference to the Patent Act. In fact, *Bennett* does not mention the Patent Act.

[14] *See also Department of Commerce v. United States House of Representatives*, 525 U.S. 316, 328-29 (1999) (Congress "eliminate[s] any prudential concerns" when it permits "any

other cases on which Feltner relies, say nothing about statutes (such as Section 501(b)) that impose requirements on causes of action that are *more restrictive* than what the prudential standing doctrine would require. Nor do these cases suggest that any statutory prerequisite to a cause of action automatically is treated as a non-waivable jurisdictional requirement.

On the contrary, this Court has indicated such statutory prerequisites are merely elements of the cause of action. This Court recently reaffirmed that an allegation that plaintiffs failed to establish a "valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89 (1998); *see also National Railroad Passenger Corp. v. National Ass'n of Railroad Passengers*, 414 U.S. 453, 465 & n.13 (1974) (issue of whether plaintiff has a valid cause of action does not implicate whether it has standing to sue). To hold otherwise, this Court explained, would "turn every statutory question [under the statute at issue] into a question of jurisdiction" and would make litigative finality impossible. *Steel Co.*, 523 U.S. at 92.

E. Even if Section 501(b) Were Jurisdictional, Review Is Unwarranted Because Feltner Is Bound By His Prior Stipulation to Columbia's Ownership.

Even if Feltner is correct that compliance with Section 501(b) is a jurisdictional requirement that a plaintiff must demonstrate in order to maintain a copyright infringement action, it does not follow that Feltner is

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person aggrieved" to sue); *Warth v. Seldin*, 422 U.S. 490, 501 (1975) ("Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules."); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982).

entitled to raise the issue now. Feltner's "standing" challenge is an attempt to renege on his written stipulation, in response to Columbia's summary judgment motion, that "Columbia holds the copyright to each . . . episode" at issue. App. 52a. Feltner does not dispute that subject matter jurisdiction is proper under the stipulated facts, and he offers no legitimate justification for vacating his prior stipulation.

It is well-established that parties are bound by factual stipulations, even if those facts relate to jurisdiction. "Parties may not stipulate to jurisdiction, but they may stipulate to facts that bear on [a court's] jurisdictional inquiry." *Engineering Contractors Ass'n v. Metropolitan Dade County*, 122 F.3d 895, 905 (11th Cir.) (rejecting belated challenge to standing), *cert. denied*, 523 U.S. 1004 (1998). Where, as here, a defendant stipulates to certain facts underlying subject matter jurisdiction, an appellate court (barring newly discovered evidence) will review only whether the stipulated facts establish jurisdiction; the defendant is barred from reneging on his prior stipulations. *Id.*; *West Peninsular Title Co. v. Palm Beach County*, 41 F.3d 1490, 1492 & n.4 (11th Cir.), *cert. denied*, 516 U.S. 932 (1995); *Smith v. Ashland, Inc.*, 250 F.3d 1167, 1171-72 (8th Cir. 2001). Such a review of the stipulations here leads to the inescapable conclusion that the courts below properly retained jurisdiction over this case.

F. Even if Section 501(b) Were Jurisdictional, Feltner's Attempt To Challenge Columbia's Ownership Would Not Change the Outcome of this Case.

Finally, this case is an inappropriate vehicle for review because Feltner cannot ultimately obtain the relief he seeks. Even if this Court were to adopt Feltner's unprecedented views that Section 501(b) is jurisdictional and that a party cannot stipulate to facts bearing on

jurisdiction, the outcome of this case would be no different. The undisputed evidence shows that Columbia's rights under the 1988 assignments are exclusive.

Feltner argues that the absence of the word "exclusive" in the 1988 assignments to Columbia from its affiliates, ELP and CPT, somehow renders the licenses nonexclusive. Pet. 20. It should suffice to note that the district court had the assignments before it on summary judgment and did not adopt the interpretation Feltner now advocates. Rather, it held that Columbia was the statutory owner of the rights in question.

This conclusion was fully supported by the record. The district court had before it the unrefuted declaration of Mr. Boone that the licenses were exclusive. Opp. App. 5a ¶ 3. As an officer of both the assignors (ELP and CPT) and the assignee (Columbia), Mr. Boone was uniquely qualified to explain the parties' intent in entering those assignments. Also, the district court was aware that prior to termination, Feltner dealt with Columbia as if it had exclusive control over the works at issue. App. 53a-55a. Columbia could not have granted Feltner's stations the exclusivity they enjoyed were Columbia's own right to license the works to U.S. television stations not exclusive.[15] Feltner's only other claim is that Columbia's

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[15] Moreover, as Columbia explained in both the district court and the court of appeals on each of the multiple occasions Feltner raised his standing argument, the licenses are exclusive because they dispose of all rights in the works in question. Columbia is granted the right to "license others to project, exhibit, reproduce, transmit and perform, by means of television," all of the copyrighted works at issue in this case. Opp. App. 9a, 11a. The assignors retain "[a]ll rights not herein granted. . . . " The assignments also give Columbia responsibilities only an exclusive licensee would have, such as obtaining legal protection for the licensed works.

grantors (through Mr. Boone) filed two short-form memoranda with the Copyright Office in 1992 characterizing the assignments as exclusive. Pet. 20. But these documents, which are not themselves assignments, are actually further evidence that the rights Columbia obtained in 1988 are exclusive.

Columbia plainly possessed exclusive licenses under copyright, and Feltner's belated attempt to argue otherwise is without merit. Hence, even if the ownership requirement in Section 501(b) were jurisdictional (and it is not), and even if Feltner could undo his prior stipulation that Columbia owned the copyrights (and he may not), this Court would neither resolve any split of authority nor even alter the ultimate outcome of this decade-old case by accepting review of Feltner's Petition.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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152 F.3d 1171 (9th Cir. 1998)

COLUMBIA PICTURES TELEVISION,
Plaintiff-Appellee,

v.

KRYPTON BROADCASTING OF BIRMINGHAM, INC.; WABM Birmingham; Krypton Broadcasting, Inc.; Krypton International Corporation; WTWV, Inc.; WTVX; Daniel S. Dayton; Alfred F. Decuir,
Defendants,

and

C. ELVIN FELTNER, JR., Defendant-Appellant.

Nos. 94-55816, 94-55894.

United States Court of Appeals,
Ninth Circuit.

Aug. 20, 1998.

Before: FARRIS, BRUNETTI, and KOZINSKI, Circuit Judges.

On February 6, 1997, we affirmed the district court's grant of summary judgment in favor of Columbia Pictures Television (Columbia) with respect to C. Elvin Feltner, Jr.'s (Feltner) liability for copyright infringement. *See Columbia Pictures Television v. Krypton Broadcasting of Birmingham, Inc.*, 106 F.3d 284 (9th Cir.1997). We also affirmed the district court's award of statutory damages after a bench trial, holding that neither § 504(c) of the Copyright Act, 17 U.S.C. § 504(c), nor the Seventh Amendment, provides a right to a jury trial on statutory damages. *Id.* at 292-93.

On September 29, 1997, the Supreme Court granted Feltner's petition for writ of certiorari on the question of whether he was entitled to a jury trial on the issue of statutory damages. *See Feltner v. Columbia Pictures Television, Inc.*, ___ U.S. ___, 118 S.Ct. 30, 138 L.Ed.2d 1059 (1997). And, on March 31, 1998, the Supreme Court reversed and remanded, ruling that, while § 504(c) is silent on this point, the Seventh Amendment provides a right to a jury trial to determine the amount of statutory damages. *Feltner v. Columbia Pictures Television, Inc.*, ___ U.S. ___, ___, 118 S.Ct. 1279, 1282, 140 L.Ed.2d 438 (1998).

On remand to this court, Feltner has filed a petition for attorney's fees under § 505 of the Copyright Act, 17 U.S.C. § 505, arguing that he is entitled to recover all fees incurred in vindicating his constitutional right to a jury trial on statutory damages.

Section 505 of the Copyright Act allows the court, in its discretion, to award a "reasonable attorney's fee" to the "prevailing party" as part of the costs. 17 U.S.C. § 505. Here, however, Feltner is not entitled to attorney's fees because he is not the prevailing party. Although the Supreme Court ruled in his favor on the narrow issue of whether he was entitled to a jury trial on statutory damages, the Court left undisturbed the district court's finding, affirmed by this court, that Feltner is liable to Columbia for 440 separate instances of copyright infringement. Because the Supreme Court's opinion does not alter Feltner's liability for copyright infringement and Columbia's entitlement to statutory damages in an amount to be determined by a jury, Feltner is not the prevailing party in this case. Therefore, as a matter of law, he is not entitled to attorney's fees pursuant to § 505.

In conclusion, we deny Feltner's request for attorney's fees, and remand to the district court for further proceedings in accordance with the Supreme Court's opinion in this case. *See Feltner*, ___ U.S. ___, 118 S.Ct. 1279, 140 L.Ed.2d 438.

REMANDED.

(Filed Dec. 1, 1992)

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Columbia Pictures Television, Inc.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

COLUMBIA PICTURES TELEVISION, INC. Plaintiff, vs. KRYPTON BROADCASTING OF BIRMINGHAM, INC.; WABM BIRMINGHAM; KRYPTON BROADCASTING, INC.; KRYPTON INTERNATIONAL CORP.; WNFT-TV; BONO EQUITY CORPORATION, a/k/a NORTH FLORIDA 47, INC.; KRYPTON BROADCASTING OF JACKSONVILLE, INC., a Florida corporation; KRYPTON BROADCASTING OF JACKSONVILLE, a Delaware corporation; KRYPTON BROADCASTING OF FORT PIERCE, INC., a Florida corporation; KRYPTON	) Case No. CV) 91-6847 ER(CTx))) **DECLARATION OF GREGORY K. BOONE IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY ADJUDICATION RE COPYRIGHT LIABILITY AGAINST DEFENDANT C. ELVIN FELTNER, JR.**

BROADCASTING OF FORT PIERCE, INC., a Delaware corporation; WTWV, INC.; WTVX; C. ELVIN FELTNER, JR.; DANIEL S. DAYTON; and ALFRED F. DeCUIR, Defendants.	Date:	December 28, 1992
	Time:	10:00 a.m.
	Place:	Courtroom of the Honorable Edward Rafeedie

GREGORY K. BOONE, states and declares as follows:

1. I am an individual residing in the State of California and am Senior Vice President, Legal Affairs, of Columbia Pictures Television, Inc. ("Columbia"), the Plaintiff in the above-captioned action. This Declaration is submitted in support of Columbia's Motion for Summary Adjudication Re Copyright Liability of Defendant C. Elvin Feltner, Jr. I have personal knowledge of the facts stated herein and if called as a witness could and would testify competently thereto.

2. As Senior Vice President, Legal Affairs, of Columbia, I am responsible for all legal matters concerning Columbia, including securing and maintaining protection under the Copyright Act for the television series that Columbia distributes to individual television stations throughout the United States.

3. As detailed in the paragraphs that follow, Columbia owns the copyright to (or has the exclusive rights under copyright to license individual television stations

throughout the United States to broadcast and/or perform each episode of the television series: (A) "Silver Spoons"; (B) "Who's the Boss?"; (C) "T.J. Hooker"; and (D) "Hart to Hart". Each episode of each series is an independent audio-visual work, separately copyrighted under the Copyright Act.

4. Because copies of the copyright certificates for each episode of the four series identified above amount to over a foot of paper, I have not attached each and every certificate to this Declaration. Instead, I have annexed printouts from Columbia's computerized records that summarize each certificate. In addition, samples of the copyright certificates are identified in the paragraphs of my Declaration that follow, and these sample certificates are also annexed hereto. I am informed by counsel of record for Columbia in this action, that copies of all copyright certificates were produced to defendants during pretrial discovery. Should the Court or the defendants believe it desirable to annex all such certificates to my Declaration (and to the other Declarations that I am submitting in support of Columbia's concurrent motions for summary adjudication) those certificates will be supplied by way of a reply Declaration.

5. The numbering of episodes for these television series may consist of a broken sequence if the first numeral in each number represents the season to which an episode belongs (e.g., first season consists of shows numbered 100-124, second season consists of shows numbered 200-224, etc.). Accordingly, under these circumstances, gaps in episode numbers do not indicate the absence of an episode.

WORKS ACQUIRED FROM ELP COMMUNICATIONS ("Silver Spoons" and "Who's the Boss?")

6. ELP Communications is the author of and original copyright owner ("claimant") for each episode of the television series "Silver Spoons" and "Who's the Boss?". Several copyright certificates, however, bear one of ELP's former names. ELP Communications formerly had the following names: Embassy Communications, Embassy Television, and T.A.T. Communications Co. A true and correct copy of ELP Communications' Memorandum of Name Change is attached as **Exhibit A** to this Declaration.

A. "Silver Spoons"

7. A true and correct copy of a printout from Columbia's computerized records summarizing the copyright certificates for all episodes of "Silver Spoons" is attached as **Exhibit B.**

8. The copyrights for episodes 101-425 of "Silver Spoons" were registered with the Copyright Office by their author and original owner, Embassy Television (now known as ELP Communications). True and correct copies of ten sample certificates, representative of the Registration Certificates for episodes 101-425, are attached as **Exhibit C** to this Declaration.

9. The copyrights for episodes 426-522 of "Silver Spoons" were registered with the Copyright Office by their author and original owner, Embassy Communications (now known as ELP Communications). True and correct copies of ten sample certificates, representative of

the Registration Certificates for episodes 426-522, are attached as **Exhibit D** to this Declaration.

B. "Who's the Boss?"

10. A true and correct copy of a printout from Columbia's computerized records summarizing the copyright certificates for all episodes of "Who's the Boss?" is attached as **Exhibit E.**

11. The copyrights for episodes 101-226 of "Who's the Boss?" were registered with the Copyright Office by their author and original owner, Embassy Television (now known as ELP Communications). True and correct copies of ten sample certificates, representative of the Registration Certificates for episodes 101-226, are attached as **Exhibit F** to this Declaration.

12. The copyrights for episodes 301-403, 405-407, 409, 411, and 413 of "Who's the Boss?" were registered with the Copyright Office by their author and original owner, Embassy Communications (now known as ELP Communications). True and correct copies of ten sample certificates, representative of the Registration Certificates for episodes 301-403, 405-407, 409, 411, and 413, are attached as **Exhibit G** to this Declaration.

13. The copyrights for episodes 404, 408, 410, 412, and 414-725 of "Who's the Boss?" were registered with the Copyright Office by their author and original owner, ELP Communications. True and correct copies of ten sample certificates, representative of the Registration Certificates for episodes 404, 408, 410, 412, and 414-725, are attached as **Exhibit H** to this Declaration.

14. By agreement, dated January 27, 1988, a true and correct copy of which is attached as **Exhibit I** to this Declaration, ELP Communications gave Columbia a "blanket" license covering all audiovisual works in which ELP then owned rights, or later acquired rights, under copyright. The blanket license agreement gave Columbia the following exclusive rights under copyright with respect to every episode of "Silver Spoons" and "Who's the Boss?"

> the right to project, exhibit, reproduce, transmit, perform and distribute, and to authorize and license others to project, exhibit, reproduce, transmit and perform, by means of television (including but not limited to pay television, cable television, free television, Community Antenna TV and any other forms of television exhibition) but specifically excluding home video in any form, throughout the Licensed Territory, all of those motion pictures, television series and mini-series, movies made for television and television specials (individually a "Product" and collectively the "Products"), whether on film or on video tape, which Licensor [ELP Communications] has or will during the term hereof, have the right to so distribute.

Exhibit I, at 1. The Licensed Territory includes the United States and its possessions. *Id.* at 6. The term of the agreement provides that the agreement continues until one party terminates on 30-day notice or until one year after delivery of the last deliverable Product. *Id.* at 5. As of this date, neither party has given 30-day notice, and ELP continues to produce and deliver products under the agreement.

WORKS ACQUIRED FROM CPT HOLDINGS, INC. ("T.J. Hooker" and "Hart to Hart")

C. "T.J. Hooker"

15. A true and correct copy of a printout from Columbia's computerized records summarizing the copyright certificates for all episodes of "T.J. Hooker" is attached as **Exhibit J.**

16. The copyright for the pilot episode of "T.J. Hooker" was registered with the Copyright Office by its original owner, CPT Holdings, Inc. A true and correct copy of the Registration Certificate for the pilot episode of "T.J. Hooker" is attached as **Exhibit K** to this Declaration. CPT Holdings, Inc. acquired the copyright through a pre-registration agreement with the author, Spelling-Goldberg Productions. *See id.* (Registration Certificate, section 4).

17. The copyright of episodes 1-89 of "T.J. Hooker" were registered with the Copyright Office by their author and original owner, CPT Holdings, Inc. True and correct copies of ten sample certificates, representative of the Registration Certificates for episodes 1-89, are attached as Ex. I to this Declaration.

D. "Hart to Hart"

18. A true and correct copy of a printout from Columbia's computerized records summarizing the copyright certificates for all episodes of "Hart to Hart" is attached as **Exhibit L.**

19. The copyrights for episodes 1-66 of "Hart to Hart" were registered with the Copyright Office by their original owner, CPT Holdings, Inc. True and correct copies of ten sample certificates, representative of the Registration Certificates for episodes 1-66, are attached as **Exhibit M** to this Declaration. CPT Holdings, Inc. owns the copyrights through a pre-registration agreement with the author, Spelling-Goldberg Production. *See id.* (Registration Certificate, section 4).

20. The copyrights for episodes 67-110 of "Hart to Hart" were registered with the Copyright Office by their author and original owner, CPT Holdings, Inc. True and correct copies of ten sample certificates, representative of the Registration Certificates for the episodes 1-89, are attached as **Exhibit N** to this Declaration.

21. By agreement, dated January 27, 1988, a true and correct copy of which is attached as **Exhibit O** to this Declaration, CPT Holdings, Inc. gave Columbia a blanket license covering all audiovisual works in which CPT Holdings, Inc. then owned rights, or later acquired rights, under copyright. The blanket license agreement granted Columbia the following exclusive rights under copyright with respect to every episode of "T.J. Hooker" and "Hart to Hart":

> the right to project, exhibit, reproduce, transmit, perform and distribute, and to authorize and license others to project, exhibit, reproduce, transmit and perform, by means of television (including but not limited to pay television, cable television, free television, Community Antenna TV and any other forms of television exhibition) but specifically excluding home

> video in any form, throughout the Licensed Territory, all of those motion pictures, television series and mini-series, movies made for television and television specials (individually a "Product" and collectively the "Products"), whether on film or on video tape, which Licensor [CPT Holdings, Inc.] has or will during the term hereof, have the right to so distribute.

Exhibit O at 1. The Licensed Territory includes the United States and its possessions. *Id.* at 6. The term of the agreement provides that the agreement continues until one party terminates on 30-day notice or until one year after delivery of the last deliverable Product. *Id.* at 5. As of this date, neither party has given 30-day notice, and CPT Holdings continues to produce and deliver products under the agreement.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

DATED this 25th day of November, 1992, at Los Angeles, California.

/s/ Gregory K. Boone
GREGORY K. BOONE